EXECUTIVE AIDS SDN. BHD.

v.

KUALA LUMPUR FINANCE BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-24-2593-89]
9 JULY 1991

COMPANY LAW: *Power of company to create third party charge - Object clause - Memorandum of association - Constructive notice - Duty of chargee to enquire - Knowledge - Whether ultra vires - Null and void - Companies Act 1965, s. 20(1).*

LAND LAW: *Order for sale challenged by chargor as null and void - Not raised at enquiry held by Land Administrator - Bona fides - Chargee or chargor cannot reopen enquiry - Discretion and jurisdiction of Land Administrator - National Land Code 1965, ss. 31, 418.*

LSP had contracted with R&G for the carrying out of mechanical and electrical installation at K.L. Plaza as a result of which LSP became indebted to R&G for a sum in excess of RM1 million. AC who was a director of R&G negotiated with WTL, a director of the defendant company for the obtaining of a loan to enable R&G to meet its expenses. The defendant agreed to lend R&G RM0.5 million; certain property which was owned by the plaintiff was charged to the defendant as security for this loan. AC was also a director of the plaintiff. R&G accepted the loan conditions as set out in the defendant's letter dated 5 February 1986.

The Land Administrator granted an order of sale of the said property on 11 March 1988. The plaintiff seeks a declaration that the charge is void and unenforceable:

(a) as it was ultra vires its powers and was not made for the benefit or purpose of the plaintiff,

(b) that the defendant had constructive notice of the absence of a relationship between R&G and the plaintiff and

(c) that the purpose of the loan was to reduce the pressure on LSP to pay to R&G the debt due by LSP to R&G.

Therefore, it argued that the order for sale was null and void and should be set aside.

The defendant submitted that the plaintiff should appeal against the Land Administrator 's decision pursuant to s. 418 of the National Land Code 1965 (NLC).

Held:

[1] Under the NLC, all questions should be raised at the Land Administrator's enquiry and the chargee or chargor cannot be allowed to reopen the enquiry of the Land Administrator by raising a matter which it had failed to earlier raise.

[2] The plaintiff had notice that the Land Administrator was going to hold an enquiry on 11 August 1987 yet the plaintiff deliberately failed to appear at the enquiry to raise any objection; in addition, after the enquiry, the plaintiff negotiated with the defendant to settle the loan.

[3] The *bona fide* of the plaintiff is questionable and the Court refused to exercise its discretion to grant the relief sought particularly when the Land Administrator had rightly and properly exercised his jurisdiction to grant the sale.

[4] If the plaintiff had any right to challenge the order of the Land Administrator, it should have appealed to the High Court under ss. 31 and 418 of the NLC.

[5] If the Court was wrong in arriving at the above conclusion, the Court examined the merits of the plaintiff's argument. The creation of the third party charge as security for a loan to R&G is within the ambit of the objects clause of the plaintiff's memorandum of assoiciation; therefore, the defendant has no business to enquire whether the plaintiff has misapplied the loan. Neither was the defendant put on notice, in relation to the objects clause, that there was an express requirement that the power to take a loan is only exercisable for the purposes of the company's business.

[6] WTL had concurred with the suggestion of TCE, a shareholder of the plaintiff, in his private personal capacity and since there is no evidence that WTL had disclosed to the other directors of the defendant, what had transpired at the meeting with AC, his knowledge concerning the loan to be given to R&G secured by the charge of the property of the plaintiff could not be imputed to the defendant company.

[7] On the facts of this case, there is no doubt that s. 20(1) of the Companies Act is applicable to the present case to render the third party charge created by the plaintiff fully effective and valid, regardless of the knowledge acquired by WTL that the said charge was not created for the benefit of the plaintiff company, which knowledge was not known to the defendant company.

[Plaintiff's application dismissed with costs.]

Cases referred to:
Yat Tung Investment v. Dao Bankers Ltd. [1975] AC 581 ***(foll)***
Sheoparnam Singh v. Ramanadan Singh [1916] 43 1 A 91 ***(cit)***
Land Executive Committee of the Federal Territory v. Syarikat Harper Gilfillan Bhd. [1981] 1 MLJ 234 ***(cit)***
Dusun Semenyih Sdn. Bhd. v. Development and Commercial Bank Bhd. [1988] 3 MLJ 156 ***(cit)***
Public Bank v. Metro Construction Sdn. Bhd. [1991] 3 CLJ (Rep) 479 ***(foll)***
In re David Payne & Co. [1904] 2 Ch 608 ***(foll)***
Rolled Steel Products Ltd. v. British Steel Corp. & Ors. [1985] 3 All ER 52 ***(dist)***
In re Hampshire Land Company [1896] 2 Ch 743 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 20(1)
National Land Code 1965, ss. 31, 260, 261, 262, 263, 418

For the Plaintiff - K.H. Chan; M/s. Khaw & Hussein
For the Defendant - L.S. Ng; M/s. Sothi & Ang

JUDGMENT

Lim Beng Choon J:

In their application made by way of this originating summons dated 5 December 1989, the plaintiff, Executive Aids Sdn. Bhd. is seeking for a declaration that the charge presentation No. 338/86 Jilid 70 Folio 53 (the charge) created by the plaintiff in favour of the defendant, Kuala Lumpur Finance Berhad, over the land held under GM 1653 Lot 1223 Mukim Batu (the property) is void and/or unenforceable against the plaintiff and therefore the order of sale dated 11 March 1988 granted by the Land Administrator (the order of sale) is null and void and any auction pursuant thereto be set aside. The plaintiff is also seeking for an order for a stay of any auction of the property pending the disposal of their application.

The case for the plaintiff, as can be garnered from the contents of the affidavit of Chan Hean Chuan @ Arthur Chan, (Arthur Chan) a director of the plaintiff affirmed on 18 December 1989 (encl. 2) is as follows. In developing Kuala Lumpur Plaza (K.L. Plaza) Lian Seng Properties Sdn. Bhd. (LSP) had contracted with Radio & General Trading Co. (Holdings) Sdn. Bhd. (R & G) to carry out the mechanical and electrical installation works on K.L. Plaza. Substantial works on the project had been carried out by R & G and by January 1986 LSP was indebted to R & G Co. for a sum in excess of RM1.0 million in respect of the works done by R & G. Arthur Chan, was at the material time, also a director of R & G. Due to the substantial sum owing by LSP to R & G which LSP has failed to pay despite repeated demands, Arthur Chan, a director of R & G, went to see Wong Teck Lim who was at the material time a director of LSP as well as director of the defendant company. At the meeting, as an interim measure, one Tan Chor Eng a shareholder of the plaintiff with the concurrence of Wong Teck Lim suggested that R & G should obtain a loan of RM0.5 million (the loan) from the defendant so that R & G would have sufficient liquid funds to meet its pressing expenses incurred in carrying out the works on KL Plaza at LSP's requests for which LSP had then yet to pay R & G. Apparently Arthur Chan agreed to the proposal and Wong Teck Lim later arranged with the defendant to lend RM0.5 million to R & G. Since the defendant could not lend money without security it suggested that the land held by the plaintiff under Lot 1223, Mukim Batu, District of Kuala Lumpur Wilayah (the charged land) was to be charged by the plaintiff to the defendant. As a result, the defendant sent a letter of offer dated 5 February 1986 to the plaintiff. By that letter the defendant offered to grant a term loan of RM0.5million to the plaintiff payable within 6 months and as security for the loan the land owned by the plaintiff be charged to the defendant. There were other conditions set out in the said letter. For the purpose of this judgement I need only to quote three of the conditions which are:

(a) Receipt of the Board Resolution from the borrower authorising the borrowing and acceptance of the facility.

(e) All relevant loan and security documents shall have been executed by the borrowers and presented for registration at the appropriate authorities.

(f) Receipt of a true copy of memorandum and articles of association of borrower.

R & G accepted the offer but with a request that the defendant should reconsider the schedule of payment. Nothing comes out of this request and this request is not in issue in the present case. Thereafter the charge was duly created by the plaintiff over the land in favour of the defendant. It was alleged by the plaintiff that at all material times R & G and the plaintiff were not related to each other in any manner whatsoever except that there were some common shareholders/directors. It was also alleged that the defendant knew that the plaintiff and R & G (being the borrower of the defendant) were not related, nevertheless requested the charge to be created. The plaintiff therefore contends that the charge is void and unenforceable for the following reasons:

1. ultra vires the powers of the plaintiff and/or was not for the plaintiff; and/or
2. the defendant's knowledge through their director Wong Teck Lim or constructive notice of the non-relationship between R & G and the plaintiff; and
3. the purpose for which the loan was intended was to reduce the pressure on LSP to pay to R & G the debt due and owing by LSP to R & G.

One Izani bin Haji Bohamad, attorney of the defendant company, affirmed an affidavit in reply on 23 August 1990 (encl. 13) in which it was asserted that the original hearing of the enquiry for an order of sale of the property was postponed to 11 August 1987 as there was negotiation for a settlement. In fact after the enquiry that was held on 11 August 1987 the plaintiff through their solicitors Messrs. L.C. Chan had paid a sum of RM30,000 to the chargee/defendant and had requested the auction fixed on 10 December 1987 to be called off. The payment was made apparently in response to the letter of the defendant dated 2 December 1987 to its own solicitors Messrs. Sothi & Ang (Exhibit 'KLF1' annexed to encl. 13) the relevant part of which reads:

Kindly liase with M/s. L.H. Chan to arrange for:

(1) a cheque of RM30,000 payable to us for immediate clearing and

(2) an irrevocable undertaking from them to pay us a further sum of RM30,000 on or before 15 December 1987. The letter of undertaking should be forwarded to us together with the initial payment of RM30,000 not later than 7 December 1987, failing which we shall proceed with the auction sale scheduled on 10 December 1987.

The first preliminary point of law brought up by Counsel for the defendant is that as the application of the plaintiff in this originating summons is in effect to set aside the order of sale which the Land Administrator had granted as far back as 11 August 1987 in respect of the property by way of public auction which was to be held on 10 December 1987, the plaintiff should appeal against the Land Administrator's decision pursuant to s. 418 of the National Land Code (the NLC). Counsel for the plaintiff on the other hand submitted that the plaintiff here was challenging the validity of the charge - it said that the charge was void and unenforceable and therefore the order of sale of the Land Administrator was likewise null and void. Now under the scheme of the NLC, the Land Administrator has been given full jurisdiction to hold an enquiry in respect of land held under a Land Office title of which a charge has been created as security for a loan given by the chargee to the chargor or a loan given to a third party which loan the chargor agreed to charge his land as security for that loan when the chargee applies to him to hold such enquiry (see ss. 260, 261, 262 and 263 of the NLC). Any defects in the procedure adopted by the chargee in his application for an order of sale which must include defects in the charge itself should be raised at the enquiry held by the Land Administrator . In the present case it is not disputed, indeed it cannot be disputed that the plaintiff had notice that the said enquiry was to be held on 11 August 1987 at 9.00 a.m. at the Land Administrator 's office at Wilayah Persekutuan (see A.R. Registered letter of the defendant to the plaintiff dated 14 April 1987 annexed as Exhibit 'KLF2' to encl. 13). Yet the plaintiff deliberately failed to appear at the said enquiry to raise any objection. I said 'deliberately' because after the enquiry the plaintiff negotiated with the defendant to settle the loan taken by them by tendering an initial sum of RM30,000 (see the letter of the defendant dated 2 December 1987 which I have produced above). So here we have a situation where the plaintiff deliberately refused to raise the question of the validity of the charge at the enquiry of the Land Administrator which they should, so that all questions relating to the charge could be settled at the enquiry, and thereafter negotiated with the defendant to settle the loan thereby leading the plaintiff to request the Land Administrator to postpone the auction of the property a number of times before it finally brought up this question of the validity of the charge to this Court on 18 December 1989 after a lapse of over two years. I repeat under the scheme of the NLC all questions should be raised at the Land Administrator's enquiry and the chargee or chargor cannot be allowed to reopen the enquiry of the Land Administrator by bringing in a matter which the party

concerned had failed to do at the beginning. An analogy may be borrowed from the case of *Yat Tung Investment v. Dao Bankers Ltd.* [1975] AC 581 in support of this proposition. After all it is not an absolute right to obtain a declaratory decree. It is discretionary upon the Court to grant it or not and the Court must exercise the discretion with care as to whether it is reasonable or not under the circumstances of the case to grant the relief prayed for - see *Sheoparnam Singh v. Ramanadan Singh* [1916] 43 1.A 91 at 97. In the circumstances of this case I question the *bona fides* of the plaintiff and I have no doubt that I am right in refusing to exercise my discretion to grant the relief sought for, particularly when the Land Administrator had rightly and properly exercised his jurisdiction to grant the order of sale. If the plaintiff had any right to challenge the order of the Land Administrator it should have appealed to this Court under s. 418 read with s. 31 of the NLC (see *Land Executive Committee of the Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234 and *Dusun Semenyih Sdn. Bhd. v. Development and Commercial Bank Bhd.* [1988] 3 MLJ 156). In arriving at the conclusion I have not overlooked the affidavit of Arthur Chan, a director of the plaintiff, affirmed on 21 July 1990 in which he exhibited the minutes of the enquiry held by the Land Administrator. At the top of the 6-page minutes there is a box on which is stated:

> Dihadapan saya pada 12 Ogos 1987 Perbicaraan di Jabatan Tanah dan Wilayah.

Arthur Chan therefore alleged that the Land Administrator had postponed the enquiry from 11 August 1987 to 12 August 1987 without informing the plaintiff. But upon a careful scrutiny of the minutes it is to be noted that after having held a full enquiry the Land Administrator wrote at the end of the 6-page minutes these words "Bertarikh pada **11 Ogos 1987**" before he stamped it with his official seal and appended his signature thereto. Viewing the evidence as a whole I have no doubt that the enquiry was held on 11 August 1987 and the date of 12 August 1987 in the box was an administrative error. If I am wrong in arriving at the above conclusion, I would examine the merits of the plaintiff's case. From the assertion of the affidavits of Arthur Chan, a director of the plaintiff company, it seems to me that the real questions posed to this Court are:

(1) whether the 3rd party charge of the defendant's property was ultra vires the objects of the plaintiff company as set out in its memorandum of association and if so whether the transaction is saved by s. 20(1) of the Companies Act 1965;

(2) whether the 3rd party charge, even *intra vires* the plaintiff company's memorandum of association if created by the directors acting outside and beyond their powers in that the charge was not created for the benefit or interest of the plaintiff company can be regarded as validly created and if not, whether s. 20(1) of the Companies Act 1965 applies to validate the charge.

To answer these two questions, it is necessary to examine the relevant clauses of the memorandum of association of the plaintiff company (annexed as Exhibit 'KB1' of the affidavit of Chan Kak Hong affirmed on 26 April 1990 - encl. 7). A scrutiny of clause 3 of the said memorandum shows that the plaintiff company was established to carry on a very wide range of business enterprises such as housing development, importing, exporting, manufacturing and sale of many kinds of goods, operating of hotels and lodging facilities operating of travel agencies, mining, quarry and so on. Four significant objects of the plaintiff are set out in paras. 31, 32, 33 and 56 of the said clause 3 which reads:

> 31. To transact business as financiers, promoters and financial and monetary agents in any part of the world and for such purposes to establish agencies and to appoint financial and managing agents and attorneys to produce the company to be registered and recognised.

32. To receive money on deposit or to borrow or raise money with or without security, or to secure the payment or repayment of money or the satisfaction, observance or performance of any obligation or liability undertaken or incurred by the company in such manner as the company thinks fit in particular by mortgage or charge upon the undertaking or any part of the undertaking of the company or upon all or any assets of the company or by the creation and issue of debentures or debenture stock (perpetual or terminable) charged as aforesaid or constituting or supported by a floating charge upon present and future property including uncalled and called but unpaid capital.

33. To lend and advance money or give credit to such persons or companies and on such terms as may seem expedient and in particular to customers, companies, corporations firms and others having dealings with the company and to give guarantees or become surety and give security to any such persons and companies.

56. To make contributions and donations and in any other manner to give aid and assistance and help to any person, firm company, association, society or other body or party for any whatsoever object or purpose.

Clause 3 of the said memorandum then ends up with the following statement:

> ... further that the objects specified in each paragraph of this clause shall be regarded as independent objects and accordingly shall except where otherwise expressed in any paragraph be in nowise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company but may be carried out in as full and ample a manner and construed just as wide a sense as if the paragraph defined the object of a separate distinct and independent company.

Now upon a cursory reading of the aforesaid paragraph there can be no doubt that the plaintiff is empowered to create a third party charge on the property to secure a loan for R & G. It is however contended that the furtherance of the object of the plaintiff company and hence the charge is null and void. I have had occasion to deal with the principle of law covering this point in my Judgment in *Public Bank v. Metro Construction Sdn. Bhd.* [1991] 3 CLJ (Rep) 479 in which I have been able to distill the principle of law covering this point after reviewing some English cases which is this:

> Where a company has a general power to borrow money for the purposes of its business, a lender is not bound to enquire into the purpose for which the money is intended to be applied and the misapplication of the money by the company does not avoid the loan in the absence of knowledge on the part of the lender that the money was intended to be misapplied - see headnote of *Re David Payne & Co.* [1904] 2 Ch 608 which was cited with approval by Harnam LJ in *Re Introduction Ltd.* [1969] 1 All E.R. 887 at 890.

In the more recent case of *Rolled Steel Products Ltd. v. British Steel Corp. and Others* [1985] 3 All ER 52 (a case relied on by Counsel for the plaintiff to support his contentions of which I shall have more to say presently), Browne-Wilkinson LJ explained the principle in great clarity when His Lordship said at p. 92:

> The critical distinction is, therefore, between acts done in excess of the capacity of the company on the one hand and acts done in excess or abuse of the powers of the company on the other. If the transaction is beyond the capacity of the company it is in any event a nullity and wholly void; whether or not the third party had notice of the invalidity, property transferred or money paid under such a transaction will be recoverable from the third party. If, on the other hand, the transaction (although in excess or abuse of powers) is within the capacity of the company, the position of the third party depends on whether or not he had notice that the transaction was in excess or abuse of the powers of the company. As between the shareholders and the directors, for most purposes it makes no practical difference whether the transaction is beyond the capacity of the company or merely in excess or abuse of its powers: in either event the shareholders will be able to restrain the carrying out of the transaction or hold liable those who have carried it out.

His Lordship went on to examine the *Payne* case and then made this proposition at p. 93:

> That case, therefore, is clear authority for two propositions: (1) that where there is power to borrow for the purposes of the company's business (even if contained in the objects clause) and the borrowing is made otherwise than for those purposes, the borrowing is not void as being ultra vires; and (2) a third party is not put on notice by an express requirements that the power is only exercisable for the purposes of the company's business.

Applying the legal principle to the present case, as the creation of a third party charge as security for a loan to R & G is within the ambit of the objects clause of the memorandum of association of the plaintiff, the defendant has no business to enquire as to whether the plaintiff has misapplied the loan. Furthermore, the defendant is, insofar as the object clause is concerned, not put on notice by any express requirement that the power to take a loan is only exercisable for the purposes of the company's business.

The matter, however, does not end here for the plaintiff has brought out the matter of a discussion which its director Arthur Chan had with one Wong Teck Lim. As LSP had failed to pay R & G a sum of over RM1 million for works done, Arthur Chan who was at the material time also a director of R & G approached Wong Teck Lim, a director of LSP to seek payment to R & G. At the meeting it was alleged that one Tan Chor Eng (a shareholder of the plaintiff) with the concurrence of Wong Teck Lim suggested that R & G should obtain a loan of RM0.5 million from the defendant of which Wong Teck Lim was at the material time a director so that R & G would have sufficient liquid funds to meet its pressing expenses incurred in carrying out the work on KL Plaza. Thereafter it was alleged that Wong Teck Lim arranged for the defendant to lend RM0.5 million to R & G. In consequence of the loan the defendant requested the plaintiff to charge its property to the defendant for the repayment of the loan. It is important to note that the suggestion was mooted by Tan Chor Eng who owned 78,871 shares of the plaintiff company and Wong Teck Lim merely concurred with the suggestion. Furthermore it was an informal meeting where Arthur Chan as director and on behalf of R & G sought payment from LSP. That being the case there is therefore no or at least not sufficient evidence to establish that Wong Teck Lim concurred with the suggestion in his capacity as director of the defendant. Even to say that Wong Teck Lim concurred with the suggestion in his capacity as director of LSP is rather tenuous simply because upon a request made by Arthur Chan for payment he as director and on behalf of LSP could only convey, to the latter whether or not LSP could pay R & G all or part of the debt or could not pay anything at all. It follows therefore that Wong Teck Lim gave his concurrence to the suggestion in his personal capacity and nothing more. It is however suggested by the plaintiff that Wong Teck Lim "later arranged for the defendant to lend RM0.5 million to R & G." But we have not been told what was the nature of the arrangement carried out by Wong Teck Lim to convince the managing director, the general manager and 4 other directors to approve the loan to R & G ? All we have is a letter from the defendant dated 5 February 1986 (see Exhibit 'AC2') approving the loan to R & G and the material terms are as follows:

Borrower	: Radio and General Trading Co. Sdn. Bhd.
Facility	: Term loan of RM500,000 only.
Tenure	: Six (6) months. Interest to be serviced monthly.
Security	: 4.8125 acres of agricultural land currently under Executive Aids Sdn. Bhd.
Guaranteed by	: Tan Jin Choon and Arthur Chan.

There are also other conditions and the more pertinent conditions are these:

> (g) Presentation of the charge for registration with relevant land Registry and a search being made by KLFB's solicitors in the relevant land Registry immediately prior to the presentation of the charge for registration confirming that the said land is free from all encumbrances and that no caveat or prohibitory order has been presented or registered over the said land or any part thereof.
>
> (i) Third party first legal charge in favour of Kuala Lumpur Finance Berhad.

From the aforesaid letter of approval of the loan to R & G it is clear that R & G applied to the defendant for a loan of RM0.5 million payable within 6 months and as security for repayment of the loan, R & G with the authority of the plaintiff, offered to charge the property of the plaintiff for repayment of the loan. I will go further and say that because Arthur Chan as director of R & G and the plaintiff company and Tan Jin Choon a major shareholder of R & G had given their guarantee concerning the repayment of the loan, the directors of the defendant company thereby agreed to approve the loan. More importantly is that the plaintiff had on 6 February 1986 executed and registered the charge of the plaintiff's property which had the seal of the plaintiff company and was signed by its Pengarah and Setiausaha. The annexure to the charge instrument also had the seal of the plaintiff company and signed by one of its directors and secretary. In such a situation where the defendant was merely approving the loan which was well secured by a charge of the plaintiff's property and the guarantee of two persons whom the defendant felt were trustworthy persons, can it be said that the defendant had notice of what transpired at the informal meeting between Arthur Chan, Tan Chor Eng and Tan Jin Choon on one side and Wong Teck Lim on the other side? I think not. In support of this proposition I would revert to the case of *In re David Payne & Co. Ltd.* [1904] 2 Ch 608 mentioned earlier. In this case one Kolckmann, who was a director of the Exploring Land and Minerals Company, and was also financially interested in David Payne Co. Ltd. having ascertained in his private capacity that that company proposed to borrow a sum of £6000 for the purpose outside the scope of its business, induced his own company to lend the said sum to that company on the security of a debenture of that company for the sum of £6250 and the money was duly affirmed for purpose outside the scope of its business. David Payne Co. Ltd. had a general power of borrowing under its memorandum and articles of association but only for purpose of its business. No other director of Exploring Land and Minerals Company except Kolckmann knew how the money was intended to apply. Subsequently David Payne & Co. Ltd. was wound up and the liquidator applied to the Court for a declaration that a second debenture for £6250 purported to have been issued by that company to the Exploring Land & Minerals Company was ultra vires and void and did not constitute a charge on the undertaking or assets of the borrowing company. The two main grounds upon which the liquidator based his case were (1) that the borrowing was not authorised by the memorandum and articles of the company and was absolutely ultra vires independently of the question whether the lending company had notice of the purposes for which the money was to be applied; (2) that Kolckmann's knowledge ought to be imputed to the lending company. As to ground (1) the Court rejected it for the reasons as stated in the headnote of the reported case which I have reproduced earlier. As to ground (2) the trial Judge Buckley J in rejecting it said at p. 611 of the reported case:

> Under the circumstances, am I to say that the Exploring Land and Minerals Company had notice of what Kolckmann knew? I think not. I understand the law to be this: that if a communication be made to an agent which it would be his duty to hand on to his principals, who in this case, of course, were the Board of which Kolckmann was but one member, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained,

and in point of the fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose, and which he did not disclose. I think, therefore, I ought not to impute to the Exploring Land and Minerals Company the knowledge which Kolckmann had.

When the matter went on appeal to the Court of Appeal, the decision of Buckley J was upheld. Is so doing Romer LJ said at pp. 618-619 of the reported case:

In the first place, where you have a limited company with a memorandum of association authorising the company to embark on a series of transactions, if among those purposes you find a power to borrow generally for the purposes of the company, I take it to be clear beyond controversy at the present day that ,when money is being borrowed within the limits of the power of borrowing as to amount, the person who lends the money is not bound to inquire to what the borrowing company is about to apply the money so borrowed; and if *David's* case (1) is an authority to the contrary, I cannot agree with it. The only other question is as to imputed notice. I take it that there was a transaction between the exploring Land and Minerals Company and David Payne & Co. of this kind. The first company lent £6000. secured by a debenture of the second company. Now that transaction was *intra vires* the second company. But there was some evidence to show that it was intended by some of the directors of the second company to apply the money for purposes not authorised and altogether improper qua the second company. Now, one director of the first company knew how that money was going to be applied. He acquired that knowledge through some conversation which he had with some people in his private capacity before that transaction was carried out by the lending company. The question is whether, inasmuch his company in authorising the lending of the money and the acquisition of the debenture and assisted in carrying out that transaction, the knowledge of that director so acquired is to be considered the knowledge of the lending company. Is that knowledge as a matter of law to be imputed to the lending company? In my opinion no such notice can be imputed at law. I take it that in such a transaction the lending company was not bound to inquire as to the application of the money at all by the borrowing company. That being so, it appears to me that knowledge independently acquired by a director in his personal capacity in respect to a matter which was irrelevant so far as concerned the lending company is knowledge which cannot be imputed to the company, for it was knowledge of something which really did not concern the lending company as a matter of law. Therefore, you cannot imply a duty on the part of the director to have told these facts to the lending company, or a duty on the part of the lending company to have inquired into that question.

The second case which I would like to refer to is *In re Hampshire Land Company* [1896] 2 Ch 743. In this case the directors of a company were empowered to borrow money on its behalf but not beyond the paid up capital of the company without the consent of a general meeting. A general meeting gave the required consent but the notices summoning the meeting did not, as required by the regulations of the company specify that borrowing beyond the limit was to be authorised by the meeting. The paid up capital of the company was only £10,000 but the money borrowed from a society was in the sum of £30,000. The secretary of the lending society was also the secretary of the borrowing company. The company was subsequently wound up and the society claimed to be entitled to prove in the winding-up of the company for a debt of £30,000 for money lent to the company. Again the question to the Court was whether the knowledge of the secretary could be imputed to the society. Vaughan Williams J answered the question in the negative and held that the money lent could be proved for in the winding-up of the company. The grounds of His Lordship's decision were summarised in the headnote of the reported case and they are as follows:

Where one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on

> him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the Court will not draw the inference that he has fulfilled these duties.

Transposing the principles enunciated by the two cases cited above to the present case, since I have found as a fact that Wong Teck Lim concurred with the suggestion of Tan Chor Eng in his private personal capacity and since there is no evidence that the former had disclosed what had transpired at the meeting with Arthur Chan to the other directors of the defendant, his knowledge concerning the loan to be given to R & G secured by the charge of the property of the plaintiff could not be imputed to the defendant company. Furthermore this is a case of a company applying for a loan of RM0.5 million to be secured by a charge of the plaintiff's property. As a licensed moneylender company, the defendant would have no hesitation in approving the loan considering that in the circumstances of this case it must be aware that the memorandum of association of the plaintiff company empowers it to enter into the transaction.

Quite apart from what have been discussed above, I must have regard to the provisions of s. 20(1) of the Companies Act 1965 which read:

> 20(1) No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute the conveyance or transfer.

From the facts of this case as adumbrated above, there is no doubt at all that the said s. 20(1) is applicable to the present case to render the third party charge created by the plaintiff fully effective and valid regardless of the knowledge acquired by Wong Teck Lim that the said charge was created not for the benefit of the plaintiff company which knowledge was known to the defendant company. Turning to *Rolled Steel Products (Holdings) Ltd.* case (*supra*) cited by Counsel for the plaintiff to support his contention that the third party charge was null and void, it is my considered opinion that the facts in that case are clearly distinguishable from the facts in the present case. There the plaintiff company, Rolled Steel Products (Holdings) Ltd. (RSP) carried on business as wholesalers of steel. The two directors were S and his father. S held 51% of the shares and the remaining 49% was held by three trustee-holders in trust for the benefit of S's children. Under clause 3(k) of RSP, it was empowered to 'lend and advance money or give credit to such persons, firms or companies and on such terms as may seem expedient ... and to give guarantee or become security for any such persons, firms or companies.' S formed another company (SSS Ltd.) and on behalf of that company entered into an agreement with C Ltd., a steel producing company, for SSS Ltd. to act as distributor of coil and cut steel for C Ltd. (which was later taken over by the British Steel Corp. (BSC)). S arranged for the plaintiff company to set up a steel service centre for SSS Ltd. to operate its business with some £400,000 borrowed from SSS Ltd. After the centre was erected SSS Ltd. commenced operation by purchasing large stocks of coil and cut steel on credit from C Ltd. thereby incurring a debt to C Ltd. which eventually amounted to some £860,000, a sum substantially in excess of its only significant asset namely the debt of £400,000 owed to it by the plaintiff company. When SSS Ltd. failed to respond to pressure to reduce the debt, BSC, acting for C Ltd. first obtained a personal guarantee of the debt from S and then proposed that the plaintiff company guaranteed SSS Ltd's debt to C Ltd. The plaintiff company was known to have sufficient assets (including another leasehold land - the Rainham site valued at £850,000) to meet the debt. As a result a scheme was devised

whereby C Ltd. agreed not to press SSS Ltd. for the repayment of the debt and further agreed to lend the plaintiff company the sum of 400,000 pounds to repay its debt to SSS Ltd. (which SSS was in turn to repay to C Ltd.) in return for the plaintiff company agreeing to guarantee the debt owed by SSS Ltd. to C Ltd. and to sell the Rainham site by a specified date and use the proceeds to repay the debt, failing which the plaintiff company would issue a debenture over its assets in favour of C Ltd. A board meeting of the plaintiff company was held on 22 January 1989 at which S and his co-director passed the necessary resolution approving the financial rearrangement and authorising the guarantee and debenture. S did not declare at that meeting that he had personally guaranteed SSS Ltd's debt to C Ltd. Under Article 17 of plaintiff company's articles of association a director who declared his interest in a contract with the company was entitled to vote as part of the quorum of two directors required for a board meeting. Following the passing of the resolution and various payments, the debt owed to C Ltd. was effectively passed from SSS Ltd. to the plaintiff company which executed a guarantee in favour of C Ltd. and S's liability under his personal guarantee was proportionately reduced. When the Rainham site was not sold by the specified date the plaintiff company executed a debenture in favour of C Ltd, and when a demand for the repayment of the debt was not met C Ltd. appointed a receiver under the debenture. The receiver eventually sold the Rainham site for sufficient sum to pay BSC the amount secured by the debenture and interest. However after payment of other preferential debts there was insufficient left to meet the unsecured liabilities of the plaintiff company. In these circumstances the plaintiff company brought an action against amongst others BSC and the receiver (the defendants) seeking a declaration that the guarantee and debentures were void and claiming repayment of the sum paid over to BSC by the receiver. The plaintiff company contended; *inter alia*, (i) that neither the guarantee nor the debenture was a deed duly authorised or executed by the plaintiff company; because of S's failure to disclose his interest (namely that his own guarantee would be reduced) at the meeting of the plaintiff's directors on 22 January 1969 to authorise the financial rearrangement meant that he was disqualified from voting at that meeting which was consequently inquorate, (ii) that the guarantee and debenture were both ultra vires the plaintiff company and void and (iii) that the directors of the plaintiff company had acted in bad faith in entering into the financial rearrangement, which fact was known to BSC and therefore BSC held the money received from the plaintiff company as constructive trustee and the defendants were liable in equity to replace that money. The trial Judge held (i) that the plaintiff company's claim that the guarantee and debenture had not been duly authorised failed in the face of the defence that the plaintiff company was to be assumed to have properly performed acts which it was within its constitution to carry out, but (ii) that the guarantee and debenture had been given by the plaintiff company for an unauthorised purpose, which fact BSC had been aware of and the plaintiff company was therefore entitled to have those transactions set aside and the money repaid. The appeal of BSC and the receiver was dismissed by the Court of Appeal for the reasons as set out in the headnote of the reported case and I need only to summarise the more relevant reasons:

(1) The defence that a company could be assumed to have properly performed acts which were within its constitution was not an absolute and unqualified rule of law applicable in all circumstances but only applied in favour of persons dealing with the company in good faith. Since C Ltd was to be taken as knowing that the resolution for 22 January 1969 would not be valid unless pursuant to Article 17 of the plaintiff company's articles of association S had in fact declared his interest in the guarantee and the debenture, C Ltd was, on the facts not entitled to assume without making further inquiry that S had fact declared his interest. There was therefore no defence to the plaintiff company's claim that neither the debenture and the guarantee were properly authorised deeds of the plaintiff company.

Pausing here to make an observation it is important to note that there is no allegation that approving the loan to R & G one or more of the directors of the plaintiff company had failed to declare his or their interest in the loan agreement and the third party charge created as security for the loan given to R & G. Indeed Counsel for the plaintiff in his submission quite correctly did not raise this issue. Reason 1 of the Court of Appeal in the *Rolled Steel Products Ltd.* is therefore irrelevant. Reverting to reason 2 of the Court of Appeal, it reads as follows:

> (2) In order to be ultra vires a company transaction had to be done in excess of, or outside, the capacity of the company and not merely in excess or abuse of the powers of the company exercised by the directors. Accordingly, whether a transaction was ultra vires depended solely on the construction of the memorandum of association and whether the transaction fell within the objects of the company, properly construed; and a transaction which was within the objects of the company or which was capable of being performed as reasonably ancillary or incidental to the objects was not ultra vires merely because the directors carried out the transaction for purposes which were not within the memorandum of association. Moreover, since the directors of a company were held out by the company as having ostensible authority to bind the company to transactions which, expressly or impliedly, fell within the powers conferred by the memorandum, a person dealing in good faith with the company was entitled to assume that the directors were properly exercising their powers for the purposes of the company and was further entitled to hold the company to the transaction. However, if the company entered into a transaction which, although *intra vires* as being within its objects, was in excess or an abuse of the directors' powers the transaction could be set aside at the instance of the shareholders; and a person dealing with the company who had notice, whether actual or constructive, that the transaction had been entered into in excess or abuse of the directors' powers could not hold the company to the transaction and would be accountable as a constructive trustee for any money or property received by him from the company. The power of the plaintiff company, under clause 3(k) of its memorandum, to lend and advance money 'on such terms as may seem expedient' was only a power and not a separate object and, furthermore, was a power which could only be used for the furtherance of the objects of the company. Since the guarantee and the debenture had been entered into in furtherance of purposes which were not authorised by the company's memorandum and were therefore beyond the authority of the directors and since that fact was known to C Ltd. the plaintiff company was entitled to disclaim those transactions.

Pausing here again to make an observation, it may be seen from discussions as set out earlier I have arrived at a conclusion that the defendant company could not be said to have any knowledge that the plaintiff company executed the third party charge not for the benefit or in furtherance of the objects of the said company. Furthermore on principle and authorities the knowledge acquired by Wong Teck Lim, one of the directors of the defendant company, could not be imputed to the defendant company. I need not repeat what have been thoroughly discussed earlier. It follows therefore reason 2 of the Court of Appeal is only relevant if it could be said that the knowledge of Wong Teck Lim could be considered as that of the defendant company which I have found that it cannot be so considered.

Reason 3 of the Court of Appeal talks of the principle that if the directors applied the company's funds in breach of the fiduciary duty they owed to the company, a third party who received the funds **with knowledge** whether actual or constructive of the directors' breach then the third party must be deemed to hold the assets as constructive trustee of the company. Again this reason is irrelevant to the present case on the same ground as stated for my rejection of reason 2 namely that the defendant company here has no knowledge whatsoever of the breach of fiduciary duty by the directors of the plaintiffs company. In the circumstances of this case any breach of fiduciary duties on the part of the plaintiff company's directors is a matter *inter se* of the directors and the company shareholders.

Notwithstanding the above three reasons given by the Court of Appeal in dismissing the BSC's appeal nonetheless it went on to say (see reason 4):

> However, it was a principle of equity that where a third party's money was obtained by an agent's unauthorised act and applied for the benefit of the agent's principal, the principal was liable to restore the money even though the third party knew the agent was not authorised to obtain or receive the money. Accordingly, it would be inequitable for the plaintiff company to be repaid the amount paid to SSS Ltd. (to enable SSS Ltd. to repay C Ltd.) since although that payment was an authorised act by the directors the sum involved had been borrowed from C Ltd. and the plaintiff company remained under an obligation to repay that sum to C Ltd.

It is interesting to note that the Court of Appeal deemed it fit to turn to equity in order to ensure that the plaintiff company should not be allowed to retain the money paid by C Ltd. To my mind the principle of equity as enunciated by the Court of Appeal is enshrined in s. 20(1) of our Companies Act 1965 which would prevent the plaintiff from complaining that the charge willingly created by them and which had the effect of inducing the defendant to give a loan to R & G is void and unenforceable.

The *Rolled Steel Products Ltd.* case (*supra*) is to my mind is of no assistance to the case for the plaintiff.

In the ultimate analysis I am satisfied that the application of the plaintiff for a declaration that the charge created by it as mentioned in the first paragraph of this judgment and the ancillary reliefs thereto must be dismissed with costs.

Also found at [1991] 3 CLJ 1766